

Formal and Informal Elements of Institution-Building. A Comment on Armin von Bogdandy and Michael Ioannidis

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András Jakab Do 9 Mrz 2017

The suggestion by Armin von Bogdandy and Michael Ioannidis sounds blunt: To face corruption and incompetence in Greece, we should recruit westernised experts to do the job of the Greek state. The Greek diaspora is large enough, many of them are highly educated, and most importantly, they have also internalised values which make Western European countries successful (esp. the ethos of public offices).

I suspect that (besides the technicalities of its implementation) one of the main counter-arguments against their proposal will concern whether it suits our traditional concept of democracy. Not by chance, the authors also emphasise that diaspora Greeks should be sent to Greece (and not French, Dutch, or *horribile dictu* German officials): so they can avoid at least the accusation of being colonial. But modern constitutional systems acknowledge institutions that bind elected majorities for the common good: constitutional courts, just to name the most obvious example, as well as [many other independent institutions](#). The likely counter-argument concerning democracy is thus on its own not a conclusive one. If populism shows how democracy can be suicidal, then an Aristotelian mixed system shows how it can be successful. Nowadays, such mixed systems can also include supranational elements, just like Armin von Bogdandy and Michael Ioannidis show. Consequently, for my part, I find the possible counter-arguments concerning democracy less intriguing, and therefore, in the following, I am going to concentrate on another general preliminary question: the nature of institution building.

Institution building is more complicated than lawyers generally assume. Lawyers normally concentrate on formal or written elements that are definitely necessary, but unfortunately also insufficient, for institutions to work properly. The failure of many well-crafted constitutions can be explained by this lawyerly naiveté – and the other side of the coin: badly designed constitutions can be successful, if the informal social or political rules substitute or correct the formal rules (until very recently, both US and UK constitutions were considered good examples of informal rules substituting badly crafted formal legal rules). Institutions should be understood as rules of the game,^[1] but many (or even most) of these rules will always be unwritten and presupposed. When playing chess, you are not supposed to hit your opponent in the face, you are not supposed to pour hot soup on his chess figures, you are not supposed to spit on the chess clock, etc. Simply describing the possible moves does not describe the full game, you need something more: you need to abide by certain civilisatory achievements that make the game possible. This is more than ‘tacit knowledge’ in the sense of Polanyi, it is not intellectual, it is moral – or to sound less emotional, we can say it is ‘cultural’. A republic without republicans, or a bureaucracy without (Weberian) bureaucrats will not work. Weak institutions can of course be caused by badly designed formal rules, but (and this seems to be more relevant for us here) they can also be caused by the cultural deficiencies of office holders.

So how should these cultural deficiencies be tackled? Unfortunately, they change very slowly and there is no ‘amendment procedure’ for the political culture of a country. But there are a few examples of how the political culture of a country can successfully change for the better. German political culture was able to make the necessary shift after the Second World War. Just to mention a few ingredients of the recipe: (1) The traditionally high-quality German legal doctrine was very helpful in crafting well-designed formal legal institutions. Even though it is an important element, for the current Greek situation this does not seem to be the most pressing point. (2) Instead of self-pity, Germans faced their own mistakes and sins (*Vergangenheitsbewältigung*). There are, of course, always easy explanations by demagogues and populists who offer excuses instead of painful honesty. After the Second World War, however, both the German elite and the general public opted for honesty about the past. (3) The fact that Germans opted for honesty about the past and then, consequently, for new political values for the future was made possible by foreign enforcement, or even more bluntly by foreign occupation: although many former Nazis survived (also in high administrative positions, infamously in the West

German foreign ministry), public discourse had a new language of political values. Germans were afraid of themselves, so they deliberately tied themselves internationally: European integration, incl. the ECHR can partly be explained by this very conscious German effort. Just like Ulysses bound himself to the mast because he was afraid of being weak when the sirens arrived, Germans were eager to build supranational institutions in Europe. (4) And finally, economic success, i.e. output, greatly contributed to the credibility and then the internalisation of these values in the population (economic success was not independent, of course, from political culture and institutions anyway).[2]

Wherever we look for relatively recent success stories on institution building with cultural shifts, some kind of strong and permanent external pressure seems to be necessary. Sometimes it is ugly foreign occupation (Austria, Japan), and sometimes it is fear of foreign occupation that sobers up local elites (Estonia's success story after 1990 motivated by fear from Russia). We should consider a corrupt, infantile or authoritarian political culture as alcoholism: it is theoretically possible to cure yourself, but in practice you normally need external help. And even after you seem to be cured, for a long time, without permanent external supervision you run the danger of sliding back. This is exactly what is happening nowadays in many former socialist countries, which since becoming members of the EU (and ceasing to be subject to the pretty efficient pressure of pre-accession monitoring and enforcement), no longer feel the need to comply with civilisatory norms of Western liberal democracies.[3] This can clearly be seen on different rule of law indexes (Bertelsmann, World Justice Project, Freedom House) which all show a slow deterioration of the quality of the rule of law in the majority of former socialist countries since their accession to the EU (most dramatically in Hungary, Croatia and Poland, less dramatically in a few other countries). To run a westernised legal system for a longer period successfully, you need westernised values internalised by those who run the system. These can be created, but only very slowly, and simply adopting new legal rules is definitely not enough. Values need to be internalised, otherwise old [pagan reflexes](#) will break out again as soon as the external pressure is gone.

The only former socialist country where the institutions of the rule of law could have become considerably stronger since EU membership was Romania. This did not happen because Romanian elites suddenly became very enlightened (and less corrupt). This happened mainly because the Romanian EU accession treaty had a special clause on 'Post-Accession Conditionality': it introduced a so-called Mechanism for Cooperation and Verification which basically meant that in the absence of the adoption of necessary measures against corruption, the Commission would unilaterally stop payments to Romania (Bulgaria has a similar clause, but there even this threat remained inefficient).

The fact that Greece seems to be in trouble again should be considered as an opportunity: the weaning-off cure can begin, the alcoholic can slowly get rid of his old drinking culture, and he will finally be hospitalised. Just giving him advice is not enough, we have to do the job for him and take away the bottles. The former soft cures obviously did not work, and it seems entirely reasonable to require new people with a different culture to sit in important positions to lead the new attempt. The suggestion by Armin von Bogdandy and Michael Ioannidis thus shows a refreshingly deeper understanding of how institutions actually work than is usual in the legal discourse.

[1] Douglas C North, *Institutions, Institutional Change and Economic Performance*, Cambridge University Press, 1990, p. 3.

[2] Daron Acemoglu and James Robinson, *Why Nations Fail?*, 2012.

[3] On the deficiencies of enforcement mechanisms, see András Jakab – Dmitry Kochenov (eds), *Enforcement of EU Law and Values*, Oxford University Press 2017.